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IN THE

SUPREME COURT OF THE UNITED STATES

No. 223

CIVIL.

PEERLESS CASUALTY COMPANY, A CORPORATION, AND BILL CURPHY COMPANY, A CORPORATION,
Petitioners,

vs.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF HOPPER BROTHERS QUARRIES, A PARTNERSHIP,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To: The Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Peerless Casualty Company and Bill Curphy Company, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled case on May 7, 1958.

CITATIONS TO OPINION BELOW.

On the 6th day of May, 1956, the United States District Court for the District of Nebraska filed its opinion finding for your petitioners and on the same date entered an order dismissing the action of Respondent. Said report is not reported in the official reports, but is set out in the Record, pp. 19-24. On the 28th day of April, 1958, the United States Circuit Court of Appeals for the Eighth Circuit filed its opinion reported in 255 F.2d 137 reversing the United States District Court for the District of Nebraska. The dissenting opinion of Judge Sanborn is reported in 255 F.2d 146.

JURISDICTION.

The original judgment dismissing the cause was entered in the United States District Court for the District of Nebraska on May 16, 1956. On July 26, 1957, an order was entered by the United States District Court for the District of Nebraska denying the motion of Respondent herein for a new trial. On May 7, 1958, judgment was entered by the United States Circuit Court of Appeals for the Eighth Circuit reversing the United States District Court for the District of Nebraska, and remanding with direction to enter judgment for Respondent herein. Petition for rehearing was denied by the United States Circuit Court of Appeals for the Eighth Circuit on the 21st day of May, 1958, and on the 27th day of June, 1958, judgment was entered in the United States District Court for the District of Nebraska in favor of Respondent herein.

The United States Circuit Court of Appeals for the Eighth Circuit denied Petitioners' petition for rehearing on the 21st day of May, 1958. On the 27th day of June, 1958, an order was entered by the United States District Court for the District of Nebraska granting a thirty day stay within which to Petition for Certiorari.

Jurisdiction is conferred on this Court by 28 U.S.C. 1254.

QUESTIONS PRESENTED.

Must the Notice from the material supplier of the sub-contractor to the prime contractor required by the Miller Act as a condition precedent to suit state with *substantial accuracy* the amount claimed?

and

Has a supplier of materials to a sub-contractor on a federal project who writes a letter to the prime contractor within 90 days after furnishing the last materials, which letter states no claim for any amount and who thereafter has some telephone conversations with the prime contractor's surety sufficiently complied with giving the written notice which is a condition precedent to suit as required by the Miller Act?

STATUTE INVOLVED.

This case involves interpretation of the Miller Act, Title 40, U.S. Code, Section 270. The portion of the Miller Act with which this case is concerned is Section 270b(a) reading as follows:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such

contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, that any person having direct contractual relationship with a sub-contractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

STATEMENT OF CASE.

Respondent, a materialman, instituted this action to recover under the Miller Act, 40 U.S.C. 270b(a), against the prime contractor and his surety for materials supplied to a subcontractor, Leonard M. McDonald and which had been used in the performance of the contract between the prime contractor and the United States of America.

On December 10, 1952, Bill Curphy Company, entered into a contract with the United States of America, for the construction of certain levees on the Omaha Levee System located near Omaha, Nebraska.

On the same day, Bill Curphy Company, as principal, and Peerless Casualty Company, as surety, executed a payment bond as required by the Miller Act in the penal sum of $29,097.50.

On January 2, 1953, Bill Curphy Company made a subcontract with Leonard M. McDonald, doing business as Omaha Rock and Excavating Company, under which McDonald agreed to furnish some 10,300 tons of crushed rock for surfacing the levees. McDonald purchased rock from Hopper Bros. Quarries between May 19, 1953 and June 16, 1953, for the surfacing, the rock being of the value of $10,000.02.

On August 7, 1953, the following letter sent by regular mail was received by the Bill Curphy Company from Hopper Brothers.

"Hopper Bros. Quarries
Lime and Rock Products
Phone 2581
Pawnee City, Nebraska
August 6, 1953

Bill Curphy Contracting Co.,
Des Moines, Iowa

Attention Mr. Curphy

We Hopper Brothers furnished Omaha Rock Ex. Co. 60142 Tons of rock in the months of May and June for the Corps of Engineers, Omaha Levee Surfacing No. 1 Levee Project, with you Mr Curphy the prime contractor.

We are unable to collect for this rock, will you give us information as to why this bill is not paid?

Truly yours,
RAYMOND HOPPER
Hopper Brothers."

The subcontract called for the furnishing of approximately 10,300 tons of rock by Omaha Rock and Excavating Co. The actual amount of the rock furnished by Hopper Bros. was 6,014.2 tons and the omission of the decimal point was as a result of a misprint or error.

In reply to the above letter Bill Curphy Company wrote to Hopper Brothers Quarries, as follows:

Hopper Bros. Quarries
Pawnee City, Nebraska

Attention: Raymond Hopper August 7, 1953

Gentlemen:

After receiving your letter this morning we called Mr. McDonald of Omaha Rock & Excavating Co. regarding your unpaid bill for rock placed on the Omaha Levee for which we had the prime contract.

He said that there is some disagreement over the rejection of some 500 tons of rock but that if you would come in and talk to him he would be glad to settle with you. He said that he talked to you by telephone several times but that you were reluctant to discuss the adjustment for the rejected rock. We are not familiar with the dispute but would suggest that you drop in to see him and try to work out a settlement to your mutual satisfaction.

He has been notified that unless he settles with you immediately the matter will be turned over to his bonding company.

Very truly yours,
BILL CURPHY COMPANY
Glen Lange /s/
Glen Lange,
Assistant Secretary.

c.c.: Anton, Hammond, Dunn, Inc."

Anton, Hammond, Dunn, Inc., of Des Moines, Iowa, referred to in the lower left hand corner of the foregoing, is the agent who wrote the bond in suit for and on behalf of Peerless Casualty Company.

Over the strenuous objection of petitioner, Raymond Hopper, one of the partners of Hopper Brothers Quarries, testified that on August 8, 1953, while the witness was at the quarries he received a telephone call from a party who stated that he was a representative of the bonding company. The following Tuesday the witness received another long distance telephone call from the same party. On Monday, August 10th, following the first telephone call, the witness went to Omaha and contacted Mr. McDonald; and in the second call which the witness received on Tuesday, the party calling made reference to the conversation which the witness had had with Mr. McDonald on the Monday preceding. The party calling on Tuesday wanted to know how the witness had come out when he talked to McDonald, and the witness told this party that he had agreed to deduct $600.00 from the amount due, and to settle for $10,000.00 which was to have been paid that day. McDonald did not pay then, but agreed to pay within a week or ten days; and the witness so reported to the person calling him over the telephone. This party then told the witness that if the witness did not receive the money shortly, the witness should let him know. This conversation occurred on August 11, after the witness had talked to Mr. McDonald on August 10th. The party with whom the witness talked on August 11th had the same voice as the party who had called the witness the preceding Saturday, August 8th. The call came from Des Moines.

When the call was made to the witness on August 8th, the party calling wanted to know if the witness had received any payment on the rock which he had delivered, and the witness told him that he had not, and the party

then wanted to know why. The witness told the party inquiring that he did not know why, but that he would go to Omaha on Monday and look up McDonald and find out what had happened. In that conversation the party calling stated that he was a representative of the bonding company, and inquired as to the amount due the respondent, Hopper Brothers, and the witness told the party calling the amount so due.

The witness told the party calling that the amount due was $10,600.02 and that party then told the witness that he understood that there was a controversy over some of the materials, and that was the reason McDonald was withholding payment. In that conversation the party calling told the witness that he had been notified by the Bill Curphy Company that they had received a letter from Hopper Brothers to the effect that Hopper Brothers had not been paid and were making demand for payment.

The District Court found that the calls were made by an authorized representative of Peerless Casualty Company.

During the latter part of August, Mr. Glen Lange, Assistant Secretary of the Bill Curphy Company, called Hopper Brothers and talked to Mr. Raymond Hopper by long distance. He told Raymond Hopper that he had just spoken to McDonald in Omaha, and McDonald had advised Mr. Lange that he, McDonald, had settled with Hopper Brothers and he wanted to verify the statement. Raymond Hopper said he had come to an agreement with McDonald as to the amount owing and McDonald had promised to pay by a certain time. Glen Lange told Raymond Hopper to let Bill Curphy Company know if McDonald did not pay and they would try to help them.

The District Court held that the letter from respondent to the contractor, dated August 6, 1953, did not state with

substantial accuracy the amount claimed, and in fact did not state any amount at all, and it further found that the only oral notice was to the bonding company, and that the bonding company was not acting as agent for the contractor, that that oral notice could hardly be considered written notice within the meaning of the Miller Act, and dismissed the action. (Record pp. 35-37).

The Circuit Court of Appeals also found that the letter did not state the amount of the claim, either in dollars and cents or in quantity of material with substantial accuracy, and in effect held that whenever there is a written notice of any kind within the ninety days stating that a supplier has furnished materials to a sub-contractor and has not been paid therefor that that notice complies with the requirements of the Miller Act.

REASONS FOR GRANTING WRIT.

I.

The Decision Is in Conflict with Decisions of Other Circuit Courts of Appeal.

The decision of the Court of Appeals in this case is in conflict with the decision of the Ninth Circuit in the case of *Bowden* v. *United States*, 239 F.2d 572. Here the Court of Appeals held to the effect that if there was a written notice of any kind within the ninety day period, which notice stated that the supplier of materials had supplied materials and had not been paid was sufficient compliance with the Miller Act. In the Bowden case the letter received by the prime contractor contained all of the information required by the Miller Act, but the letter was sent by the sub-contractor instead of the suppliers and the Ninth Circuit held that the notice was insufficient. There is further conflict in the cases, when you examine the case of *Houston Fire &*

Casualty Insurance Company v. *United States*, 217 F.2d 727. There the Fifth Circuit held that if there was a writing which together with oral testimony gave all of the information required by the Miller Act there was sufficient notice. Actually, this case is in conflict with a prior case in the Eighth Circuit, *United States* v. *Northwestern Engineering Co.*, 122 F.2d 600, which held that even the delivery of invoices setting out the exact materials and the amounts of the materials, was not sufficient compliance with the statute. The dissenting Judge below agreed with this contention. In the interest of uniformity of decisions between Circuits this Court should pass on the question.

II.

This Case Raises an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The statute states that the notice must state with substantial accuracy the amount claimed. There has actually been no decision in this Court passing on the exact question presented here, although the decisions of this Court tend to be in conflict with the decision of the Eighth Circuit. The amount involved here is small, but the question is important. There is scarcely a volume of the Federal Reports go to press but what some Court is not called upon to pass on the question. A decision from this Court would tend to clarify the law and put an end to needless litigation.

III.

The Eighth Circuit Court of Appeals Has Decided a Federal Question in a Way Which Tends to Be in Conflict with the Applicable Decision of This Court.

It is true that this Court said in interpreting the predecessor of the Miller Act, the Heard Act, that "in every case

which has come before this Court, where labor and materials were actually furnished for and used in performance of the work contemplated in the bond, recovery was allowed, *if the suit was brought within the period prescribed by the act* (Italics ours). Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute." *Illinois Surety Co.* v. *John Davis Co.*, 244 U.S. 376, 37 S.Ct. 614, 61 L.Ed. 1206. But in that case all that was necessary to be decided was that the prime contractor had merely sublet the contract, and the claims were against sub-contractors, and in addition thereto this Court has on several occasions recognized the limitations of the Miller Act. In *MacEvoy* v. *United States*, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163, in interpreting the Miller Act, the Court said: "But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds." and * * * "we cannot disregard the limitations on liability which Congress intended to impose and did impose in the proviso of Par. 2(a). However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment * * *. Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' " *Fleisher Engineering & Construction Company* v. *United States*, 311 U.S. 15, 61 S.Ct. 81, 85 L.Ed. 12, recognizes that as far as sub-contractors are concerned the statute only has two breakdowns. One, that there is a provision explicitly stating the condition precedent to the right to sue, and two, provisions as to the matter of serving notice.

The lower Court has misinterpreted *United States* v. *Carter*, 353 U.S. 210, 77 S.Ct. 793, 1 L.Ed.2d 776, and has in fact ignored the plain wording in the case. The case does say, "The essence of its policy (The Miller Act) is to provide a surety, who by force of the Act, must make good the

obligations of the defaulting contractor to his suppliers of labor and material," but the case also says, "But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds." And also, "Thus the act provides a broad but not unlimited protection," and the foot note states that, "one limitation, inapplicable here, comes from the proviso in Par. 2 (a)." All this Court really held, and justifiably so, is that in the face of a stipulation that contributions to the Trustees of a health and welfare fund were a part of the consideration the contractor agreed to pay for the services of laborers on his Federal construction jobs and are unpaid, that the laborers are not paid in full and the Trustees have claims against the contractor and the surety company under the Miller Act.

To allow the decision of the Eighth Circuit to be undisturbed in this cause is to approve judicial legislation. The Miller Act states in no indefinite terms that the notice must state with substantial accuracy the amount claimed. Webster's New International Dictionary defines substantial as meaning, "material; essential; firm; or pertaining to the nature of." It defines accuracy as, "the state or quality of being accurate; freedom from mistake or error, exact conformative truth, precision; exactness, correctness." Both the District Court and the Circuit Court found that the letter did not state, "with substantial accuracy the amount claimed," and in fact did not state the amount at all, and as a matter of fact did not state the quantity of materials with even substantial accuracy, but yet the Circuit Court goes on and ignores the plain words of the statute. It is the duty of the Courts "to interpret statutes not to make them." *New York County National Bank* v. *Massey*, 192 U.S. 138, 24 S.Ct. 199, 48 L.Ed. 380. "* * * The law shall be taken as it is written * * *." *Plymouth Cordage Co.* v. *Smith*, 194 U.S. 311, 24 S.Ct. 725, 48 L.Ed. 922. "The responsibility for the justice

or wisdom of legislation rests with Congress, and it is the province of the Courts to enforce not to make, the laws." *United States* v. *First National Bank*, 234 U.S. 245, 34 S.Ct. 846, 58 L.Ed. 1298.

This Court pointed out in *United States* v. *McCord*, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893, in a case interpreting the old Heard Act that "the statute thus creates a new liability and gives a special remedy for it and upon well settled principles the limitations upon such liability becomes a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself." and you went on and stated in the same case that, "whatever the motive, the language used clearly expresses the legislative intention and admits of no doubt as to its meaning. This being so, it is only the province of this Court to enforce the statute in accordance with its terms."

While it is true that the primary duty of the Courts is to construe the language so as to give effect to the intent of Congress, *United States* v. *American Trucking Assn., Inc.*, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345, *Danciger* v. *Cooley*, 248 U.S. 319, 39 S.Ct. 119, 63 L.Ed. 266, *United States* v. *Fisher*, 2 Cranch. 358, 2 L.Ed. 304, still "the primary rule is that words are to be taken in their ordinary sense." *Danciger* v. *Cooley*, *Supra*, *United States* v. *Kirby Lumber Co.*, 284 U.S. 1, 52 S.Ct. 4, 76 L.Ed. 131, and when the words are plain there is no room for construction, *Osaka Shosen Kaisha Line* v. *United States*, 300 U.S. 98, 81 L.Ed. 532, 57 S.Ct. 356, *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 70 L.Ed. 1059, 46 S.Ct. 619, *Thompson* v. *United States*, 246 U.S. 547, 62 L.Ed. 876, 38 S.Ct. 349, *Matson Nav. Co.* v. *United States*, 284 U.S. 352, 76 L.Ed. 336, 52 S.Ct. 162, and, "it is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Washington Market Co.* v. *Hoffman*, 101 U.S. 172, 95 L.Ed. 782, *McDon-*

ald v. *Thompson*, 305 U.S. 263, 83 L.Ed. 164, 59 S.Ct. 167, *United States* v. *Standard Brewery, Inc.*, 251 U.S. 210, 64 L.Ed. 229, 40 S.Ct. 130.

It is true that the Miller Act does say, "every person who has furnished labor or material * * * and who has not been paid * * * shall have the right to sue * * *" which is a general statement, but then after that there is the limitation on that right to sue. The limitation deals specifically with the rights of sub-contractors. A part of the specific terms is that a notice must be given stating with substantial accuracy the amount claimed. "Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *D. Ginsberg and Son, Inc.*, v. *Popkin*, 285 U.S. 204, 76 L.Ed. 704, 52 S.Ct. 322.

As a matter of fact Congress intended to put the limitation in the Act just as it reads. They pointed out that "One protected by the bond must be vigilant in the prosecution of his rights", and that "a sub-contractor may avail himself of the protection of the bond by giving written notice to the contractor." 74th Congress, 1st Session, House Report No. 1263, Senate Report No. 1238. While they intended to have the written notice they also put into the bill what the written notice must contain, and that certainly is a part and parcel of the intent of Congress, so that even if this Court feels that it has to look at the intent of Congress the intent still falls within the interpretation urged by your Petitioners. It is pointed out by the Ninth Circuit in the case of *Bowden* v. *United States*, *Supra*, "A brief letter from the supplier to the prime contractor will make certain and unambiguous the right and liabilities of all concerned—the supplier, the prime contractor, and the surety. We do not believe that Congress intended to have it held that such little expenditure of effort is too much diligence to require of a supplier in order that he may secure his right of action on the payment bond."

Time and time again this Court has stated that it does not make the laws, that is the province of Congress. In this case the Eighth Circuit has gone directly contrary to decisions of this Court in judicially deciding that what is in a statute should not be in the statute and in effect striking it out.

CONCLUSION.

For the foregoing reasons this Petition for Certiorari should be granted.

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